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In the

Supreme Court of the United States

OCTOBER TERM, 1949

No. 603

ECKERT-FAIR CONSTRUCTION COMPANY,
Petitioner,

v.

CAPITOL STEEL & IRON COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT AND SUPPORTING BRIEF

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No.....

ECKERT-FAIR CONSTRUCTION COMPANY,
Petitioner,

v.

CAPITOL STEEL & IRON COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

Petitioner, Eckert-Fair Construction Company, a corporation, respectfully petitions this Honorable Court to issue its writ of certiorari to the Honorable United States Court of Appeals, Fifth Circuit, and as grounds therefor respectfully shows to this Honorable Court as follows:

I.

This is a diversity suit brought on November 24, 1948, by respondent, Capitol Steel & Iron Company, an Oklahoma Corporation, against petitioner, Eckert-Fair Construction Company, a Texas corporation (R. p. 37), in the United States District Court for the Northern District of Texas to recover a balance claimed to be owing

on a building and construction contract and for the reasonable value of labor and materials claimed to have been furnished as extras thereto. The balance claimed on the contract was $1423.59; the second count claimed $2173.77 for reasonable value of labor and materials; another count claimed $3270.29 for the reasonable value of labor and materials, and the fourth count claimed $2392.00 for the reasonable value of steel doors installed by respondent it alleged through its own error. (R. pp. 3-9.)

Petitioner answering said suit denied owing respondent anything, moved to strike the item for the steel doors as showing no claim, and plead accord and satisfaction as to all claims sued on. (R. pp. 25-27.)

The district court gave judgment upon trial, without a jury, for respondent for items, $1423.59 (less $260.59), $2173.77, and $2392.00 only, holding against respondent as to the item for $3270.29. (R. p. 141.)

The United States Court of Appeals, Fifth Circuit, reversed as to the item of $2392.00, and affirmed as to the items $1423.59, less $260.59, and $2173.77, or an aggregate of $3336.77, holding there was no accord and satisfaction proved as to these items.

THE FACTS ARE NOT DISPUTED

Prior to July 21, 1948, there was a bona fide dispute between petitioner and respondent as to the amount owing respondent by petitioner, and on that date petitioner at Dallas, Texas, addressed and mailed a letter to respondent at Oklahoma City, Oklahoma, in which it itemized all

charges and counter-charges between them, being the same identical items sued on by respondent, except the item for steel doors, arriving at a balance of $20,268.71 in favor of respondent. A check for that amount was enclosed, marked on the face thereof, "Final Payment Stock Show Contract", and the letter enclosing the check stated that the check was tendered "in final payment of our contract for the above mentioned building in Fort Worth, Texas" and "in full settlement of this work." This letter with the check enclosed was received by respondent and the check was cashed by it on July 23, 1948. (R. pp. 28-32; p. 43.) On August 7, 1948, plaintiff answered defendant's letter of July 21, 1948, and stated that it was not willing to settle the account on the basis of defendant's calculations, and advising that the amount paid had been credited to defendant's account. (R. pp. 45-47.)

Thereafter, on November 24, 1948, respondent brought this suit.

All the items involved in the suit are admitted to be the same items, with the exception of the steel doors, that were involved in the dispute, and mentioned in petitioner's letter to respondent of July 21, 1948. (R. p. 41.) Respondent neither alleged nor claimed any fraud, mistake or waiver.

Respondent in its first supplemental petition admitted that it "received, accepted and cashed" the check for $20,-268.71. (R. pp. 1 and 2.) The check was received at respondent's office and like most offices went into the auditing department, and respondent cashed the check. (R.

p. 44.) The letter and check were introduced into evidence by respondent. (R. pp. 42-44.) The letter appears on pages 28-31 of the record, and the check on page 43. No offer to return the check or its proceeds was ever made.

II.
JURISDICTION

Constitution of the United States, Art. 3, Sec. 1.

The sole basis for jurisdiction is diversity of citizenship. Capitol Steel & Iron Company, plaintiff in the United States District Court, is a corporation organized under the laws of the State of Oklahoma, and the defendant, petitioner herein, Eckert-Fair Construction Company is a corporation organized under the laws of the State of Texas. (R. p. 3.) The amount involved was and is in excess of Three Thousand ($3,000.00) Dollars.

Title 28, Section 1254, Subsection 1, United States Code, Judiciary and Judicial Procedure.

The date of the judgment to be reviewed is December 9, 1949.

III.
QUESTIONS PRESENTED

(1) Whether in a diversity suit, under the undisputed facts in this case, a judgment rendered in disregard of the decisions of the highest courts of Texas by a federal court sitting in Texas, and without the injection of any foreign law, should be permitted to stand, holding that there was no accord and satisfaction shown because there was no proof of acceptance by respondent and that the cashing of the check by respondent tendered in full settle-

ment did not constitute acceptance of the terms upon which it was tendered, and rendering judgment for plaintiff, when under the same identical facts, if the case had been tried in a Texas court the exact opposite result would have obtained, Texas courts holding there is a complete accord and satisfaction shown on the same facts, because the cashing of the check by respondent constituted acceptance as a matter of law of the terms upon which it was tendered, and judgment would have been rendered for defendant.

(2) Whether a federal court sitting in Texas in a diversity suit may require more onerous proof to establish the defense of accord and satisfaction than is required by the decisions of the highest courts of Texas to establish such defense.

Under Texas decisions the only proof required to establish the defense of accord and satisfaction is proof of a bona fide dispute concerning the account, tender by the debtor of his check in full settlement of the account, and receipt and cashing of such check by the creditor; but in this case the lower federal courts have required defendant to produce other and additional evidence of acceptance by the creditor other than the receipt and cashing of the check tendered in full settlement of the disputed account.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT:

1. The decisions of both lower Federal Courts on the undisputed facts in this case are clearly in conflict with the decisions of the highest courts in Texas on the same state of facts. Under the undisputed facts herein a Texas

court would have rendered judgment for the defendant, petitioner herein.

As shown by the Texas authorities in our Supporting Brief, the rule in Texas in accord and satisfaction cases is:

Where there is a bona fide dispute between the debtor and the creditor concerning an account, or if the matter be unliquidated, and the debtor tenders the creditor his check in full settlement of the account, which check the creditor received and cashes, there is a complete accord and satisfaction, and the creditor is barred from recovery of any balance on the account. The Texas courts hold that the cashing of the check is an acceptance of the terms upon which it is tendered, and that at that point the minds of the parties meet, and the accord and satisfaction is complete.

In this case the undisputed facts (they are shown in the opinion of the Honorable United States Court of Appeals, ... Federal 2d ..... (not yet reported) show that every requirement of the Texas law has been met to establish a complete defense of accord and satisfaction to the claims sued on by respondent herein: a bona fide dispute between the parties concerning the account, a tender of the check by the debtor, petitioner, to the creditor, respondent, on condition that it be in full settlement of the disputed account, the receipt of the letter and check by the creditor, and the cashing of the check and the application of its proceeds by the creditor-respondent on account.

> "It is the settled law of this state that, when an account is made the subject of a bona fide dispute between the parties as to its correctness, and the debtor

> tenders his check to the creditor upon condition that it be accepted in full payment, the creditor must either refuse to receive the check or accept the same burdened by its attached condition. If he accepts the check and cashes the same, he impliedly agrees to the condition, although he may expressly notify the debtor that he is not accepting the same with the condition, but is applying same as a partial payment on the account." *Root & Fehl v. Murray Tool Company, 26 S. W. 2d 189, 75 A. L. R. 902, Texas Commission of Appeals, approved by the Supreme Court of Texas.*

Both lower federal courts failed, declined and refused to follow the above rule as announced by the highest court in Texas, and on the undisputed facts enter judgment for the defendant, as would have been done in a Texas court; on the contrary each held that such undisputed facts did not show an accord and satisfaction and consequently entered judgment for the plaintiff, holding that although there was a bona fide dispute between petitioner and respondent concerning the account and petitioner made tender of its check on condition that it constitute settlement in full of the account, and the letter and check were received and the check was cashed and the proceeds retained by respondent, and no offer made to restore same, there was no acceptance on the part of respondent, and hence no accord and satisfaction. Under Texas decisions the receipt and cashing of the check by the creditor tendered in full settlement of the disputed account constitutes acceptance as a matter of law of the terms upon which it is tendered, and no further proof of acceptance is required.

The Honorable United States Court of Appeals bases its decision on the sole proposition that the cashing (deposit-

ing) of the check by respondent was not such "acceptance" as to constitute an accord and satisfaction binding upon it. This holding directly conflicts with the Texas decisions, which hold to the exact contrary, namely, that the cashing of the check tendered in full settlement of the disputed account does constitute an acceptance thereof and of the terms of the tender, and effectuates an accord and satisfaction. *Root & Fehl v. Murray Tool Company, 26 S. W. 2d 189, 75 A. L. R. 902, Texas Comm. App.*, approved Supreme Court of Texas, and the other Texas cases cited in our Supporting Brief hereto annexed.

Should the decision of the Honorable United States Court of Appeals stand as the law of the federal courts, that the creditor may receive the check of the debtor tendered in full settlement of the disputed account, cash the check, keep the money, and still not be bound by the tender as in accord and satisfaction, then it must follow that the defense of accord and satisfaction in the federal courts is but an empty gesture, and the great volume of disputes heretofore and that might hereafter be settled, not only in Texas but in every state in the Union, by the ancient and salutary doctrine of accord and satisfaction may now go into the Federal Court for litigation over the balance claimed, freed of the defense of accord and satisfaction.

2. The Honorable United States Court of Appeals, Fifth Circuit, requires more onerous proof to establish the defense of accord and satisfaction than is required by the highest courts of Texas, and, therefore, in this respect conflicts with the Texas decisions. The highest courts of Texas

merely require proof of a bona fide dispute between the creditor and the debtor, a tender by the debtor of his check in full settlement of the disputed account, and the cashing of the check by the creditor as an acceptance of the terms upon which it was tendered, and binds the creditor to the terms.

But the Honorable United States Court of Appeals holds that the receipt of the letter and check and the cashing of the check by respondent is not an acceptance thereof and of the terms upon which it was tendered. Petitioner must, therefore, prove acceptance in some other manner. What such other evidence may be the court does not say. Perhaps a written statement given by the creditor simultaneously with the cashing of the check would suffice. If so, the defense of accord and satisfaction in the federal court would be of little or no avail, because few if any defendants could ever produce such evidence. The creditor by withholding such evidence could receive the debtor's check tendered in full settlement, cash same and retain the funds, and bring his suit in the federal court for the balance, without fear of any defense of accord and satisfaction. This should open up the federal courts to a flood of litigation by diversity litigants suing for the balance on their disputed claims.

3. The decision of the Honorable United States Court of Appeals, Fifth Circuit, does not follow and conflicts with the salutary rule laid down by this Honorable Court in the following decisions, to the effect that a Federal

court should follow the State decisions of the State wherein it sits:

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, 114 A. L. R. 1487, "premised on the theory that in diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than the state court. If recovery could not be had in the state court, it should be denied in the federal court. Otherwise, those authorized to invoke the diversity jurisdiction would gain advantages over those confined to state courts". See *Ragan v. Merchants Transfer & Warehouse Company, U. S. Supreme Court, No. 522, October Term, 1948, 93 L. Ed. 1248, 337 U. S. 530.*

Ragan v. Merchants Transfer & Warehouse Co., Inc., supra, held that where plaintiff's cause of action was barred by state statute of limitations so that plaintiff could not recover in state court, plaintiff could not recover in a federal court sitting in that state.

Since under the undisputed facts in the case at bar respondent was barred by Texas rule of decision law from a recovery of any alleged balance in Texas courts, having received and cashed the check tendered in full settlement, and about which there was a bona fide dispute, respondent should likewise, under the same undisputed facts, be denied a recovery of the claimed balance by a federal court sitting in Texas.

The requirements as to proof of defense should be the same in the federal court as in a state court wherein it sits. *Cities Service Oil Company v. Dunlap, 308 U. S. 208, 84 L. Ed. 196, 60 Sup. Ct. 201.*

Wherefore, for the reasons herein set forth as well as those in the Supporting Brief hereto annexed petitioner prays that this Honorable Court issue its Writ of Certiorari to the Honorable United States Court of Appeals, Fifth Circuit, commanding such Honorable Court to forthwith send up a full and complete certified transcript of the record in the case styled *Eckert-Fair Construction Co., appellant v. Capitol Steel & Iron Co., appellee, No. 12,748,* on the docket of said Honorable United States Court of Appeals, Fifth Circuit, and that this cause be reviewed by this Honorable Court, and that upon hearing by this Honorable Court the judgment of United States Court of Appeals, Fifth Circuit, be reversed in so far as it affirmed the judgment of the trial court, the United States District Court for the Northern District of Texas; otherwise affirmed, except that all costs in all courts be charged against respondent. And for such other relief as to this Honorable Court may seem proper.

Respectfully submitted,

Jackson N. Townsend, Jr.
Attorney for Petitioner.

Jackson N. Townsend
Of Counsel.

Certificate

Jackson M. Townsend, Jr. one of the counsel preparing the foregoing Petition and Brief hereby certifies that same is made in good faith and that in his opinion there are good grounds for same, and that such Petition and Brief are not interposed for delay.

Jackson M. Townsend, Jr.
Attorney for Petitioner.

Jackson M. Townsend
Of Counsel.

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No.....

ECKERT-FAIR CONSTRUCTION COMPANY,
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v.

CAPITOL STEEL & IRON COMPANY,
Respondent.

BRIEF OF PETITIONER

I.

For INDEX see pages i–ii, preceding.

II.

The opinion of the Honorable United States Court of Appeals, Fifth Circuit, ... Fed. 2d ....., has not been reported, but appears on pages 150 to 156 inclusive, of the certified copy of the record from said United States Court of Appeals. The judgment is dated December 9, 1949, certified copy of record, page 157. Petitioner's (Appellant's) Motion for Rehearing was filed December 27, 1949, page 158 of certified copy of Record, which Motion was denied January 9, 1950, certified copy of Record, page 171.

III.
JURISDICTION

Constitution of the United States, Art. 3, Sec. 1.

The sole basis for jurisdiction is diversity of Citizenship. Capitol Steel & Iron Company, plaintiff in the United States District Court, is a corporation organized and existing under the laws of the State of Oklahoma, and defendant, petitioner herein, Eckert-Fair Construction Company is a corporation organized and existing under the laws of the State of Texas. (R. p. 3.) The amount involved was and is in excess of Three Thousand Dollars.

Title 28, Sec. 1254, Subsection 1, United States Code, Judiciary and Judicial Procedure.

IV.

Statement of the case as set out in Petition for Writ of Certiorari on pages 1-2-3 is here adopted.

Petitioner calls to the attention of this Honorable Court the undisputed facts set out in the opinion of the Honorable United States Court of Appeals, as follows:

> "The erection of the buildings was completed in January, 1948, and a controversy thereafter arose between the parties hereto as to the amount owing for extra materials furnished and work and labor done under their contract. The dispute continued for about six months, during which time the parties through their representatives met and attempted to reach an agreement as to the balance due. After two or three meetings and conferences they finally failed to agree.
>
> "The record reveals that on July 21, 1948, defendant wrote plaintiff a letter in which it itemized all

charges and countercharges claimed between them under their contract up to that date, arriving at a balance of $20,268.71 in favor of plaintiff. A check for that amount was enclosed which recited 'Final payment stock show contract'. This letter with check enclosure was received and the check was cashed on July 23, 1948.

"Here, as revealed in its letter of July 21, 1948, defendant in tendering its check was clearly disputing plaintiff's right to recover for many of the items and amounts later set forth as an alleged indebtedness in the complaint. Manifestly, therefore, all the claims and invoices sued on were in dispute as shown by the wording and content of the letter in which the check for $20,268.71 was transmitted. In the letter at least some amount on each of the invoices other than invoice No. 9428 was allowed. No mention was made of the double steel doors for the reason that no claim was made for the doors until a later date.

"We conclude, therefore, that a bona fide dispute and controversy existed as to all of the amounts claimed to be due, with the exception of the claim for the value of the doors. Moreover, the check sent bore the notation 'Final payment stock show contract', and the letter enclosed stated that the check was tendered 'In final payment of our contract for the above mentioned buildings in Ft. Worth, Texas' and 'in full settlement of this work'.

"On August 7, 1948, plaintiff answered defendant's letter of July 21st, and stated that it was not willing to settle the account on the basis of defendant's calculations. * * * After the check was deposited by the auditing department of plaintiff it is without dispute that upon the return of Mr. Shubert, plaintiff's representative, a letter was written within a reasonable time rejecting the settlement offer, and advising that the amount paid had been credited to defendant's account."

The letter referred to in the last sentence above is plaintiff's, Respondent's, letter of August 7, 1948, just above referred to and shown in the record at pages 45-6-7.

The Honorable United States Court of Appeals says that its decision turns upon the question whether the depositing (cashing) of the check by respondent is an acceptance by it as to constitute an accord and satisfaction, and then holds that the cashing of the check so tendered in full settlement of the account does not constitute an acceptance by respondent. The Honorable Court reaches this conclusion because of the letter of August 7, 1948, by respondent by Mr. Shubert (R. pp. 45-6-7), advising that the proceeds of the check had been applied on account and that respondent rejected the settlement offer.

V.
SPECIFICATION OF ERRORS

1.

The receipt and cashing of the check for $20,268.71 by respondent tendered in full settlement of the disputed account constitutes as a matter of law an acceptance of the check and of the terms upon which it was tendered, under the decisions of the highest courts of Texas and is an accord and satisfaction of the disputed claims sued on herein, and respondent's letter of August 7, 1948 is a mere ineffective protest, and the Honorable United States Court of Appeals, Fifth Circuit, erred in not so holding, and its decision to the contrary is in conflict with Texas decisions.

2.

The Honorable United States Court of Appeals, Fifth Circuit, erred in holding that before there could be an accord and satisfaction between petitioner and respondent, under the undisputed facts of this case, petitioner had the burden of proving an acceptance of the check and the terms upon which it was tendered by evidence other than showing that petitioner received and cashed the check tendered in full settlement of the disputed account, because its holding in that respect conflicts with the decisions of the highest courts of Texas.

3.

The Honorable United States Court of Appeals, Fifth Circuit, erred in not following the decisions of the highest courts of Texas in determining whether respondent accepted the check and the terms upon which it was tendered by cashing the check and retaining the proceeds thereof, because if it had followed the Texas decisions it would have held that the cashing of the check was an acceptance by respondent of the terms upon which it was tendered, and would have held that there was a complete accord and satisfaction proven, and would have reversed the judgment of the trial court as to the item of $3,336.77, and entered judgment that respondent take nothing by its suit.

4.

The Honorable United States Court of Appeals erred in not following the rule laid down by this Honorable Court in the case of Erie Railroad v. Tomkins, 304 U. S. 64, 58

Sup. Ct. 817, and cases following that case, that a federal court, in a diversity suit of the kind involved herein, must follow the decisions of the highest courts of the state in which it sits.

5.

No foreign law is involved in this case.

VI.

ARGUMENT AND AUTHORITIES UNDER ASSIGNED ERRORS 1, 2, 3, AND 4

That facts involved in this case are not in dispute, and we here adopt the statement made on pages 2-4 and paragraph IV, pp. 14-15 of the Petition for Writ of Certiorari, Supra. The facts are also accurately stated in the opinion of the United States Court of Appeals, quoted in paragraph IV, pp. 14-15 of this Brief, supra. For brevity we summarize same as follows: Prior to July 21, 1948, the account existing between petitioner and respondent was in a bona fide dispute, as well as unliquidated. On that date petitioner tendered its check for $20,268.71 to respondent in final payment and full settlement of the account. Respondent received this check and the letter tendering same on July 21st or 22nd, and cashed the check on July 23, 1948, and applied the proceeds on the disputed account. No offer was ever made to return the check or the proceeds thereof.

On August 7, 1948, respondent replied to petitioner's letter of July 21st, and advised petitioner that it had applied the proceeds of the check on account, and that respondent rejected the settlement offered. (R. pp. 44-46.)

On November 24, 1948, respondent brought suit in the United States District Court, Northern District of Texas, for the balance of the disputed account. To which suit petitioner duly plead accord and satisfaction.

Petitioner respectfully submits that under the Texas decisions when respondent received the letter and check of July 21, 1948, and cashed the check, it thereby as a matter of law accepted same and the terms upon which the tender was made, and the accord and satisfaction was complete, and no further proof of said accord and satisfaction was required or necessary; that respondent's reply of August 7, 1948, is a mere protest, and ineffective for any purpose, since neither the tendered check nor the proceeds thereof were returned or offered to be restored to petitioner.

The rule in Texas, governing such cases as this one, is clearly and succinctly stated by the Texas Commission of Appeals in an opinion approved by the Supreme Court of Texas, in the case of *Root & Fehl v. Murray Tool Company, 26 S. W. 2d 189 (same case, 16 S. W. 2d 316 by Texas Court of Civil Appeals)*, where it appears the dispute was not about the verified account claimed by Murray Tool Company, but about an offset for services for cleaning out a well, which according to the court made the entire amount uncertain. Root & Fehl delivered its check to Murray Tool Company "on which was endorsed that same was given as payment in full of said account". The District Court rendered judgment for defendant. The Court of Civil Appeals reversed and remanded on its interpretation of a jury finding that when the check was delivered there was no agreement that it would be in full satisfaction of all claims and

controversies. The Texas Commission of Appeals reversed the Court of Civil appeals, holding same to be an accord and satisfaction, said:

> "It is the settled law of this state that, when an account is made the subject of a bona fide dispute between the parties as to its correctness, and the debtor tenders his check to the creditor upon condition that it be accepted in full payment, the creditor must either refuse to receive the check or accept same burdened by its attached condition. If he accepts the check and cashes the same, he impliedly agrees to the condition, although he may expressly notify the debtor that he is not accepting the same as a partial payment on the account. Stetson-Preston Co. v. H. S. Dodson & Co. (Tex. Civ. App.) 103 S. W. 685; Hunt v. Ogden, 58 Tex. Civ. App. 443, 125 S. W. 386; Daugherty v. Herndon, 65 S. W. 891; Buford v. Construction Co. (Tex. Civ. App.), 279 S. W. 513; Simms Oil Co. v. American Refining Co. (Tex. Comm. App.), 288 S. W. 163.
>
> "We think, in view of the fact that there was no evidence in the record of any express agreement between the parties that the check was to be accepted only as partial payment, the legal effect of the acceptance with the knowledge of the recital on the check that it was tendered in full payment, as a matter of law, operated to sustain plaintiff in error's plea of accord and satisfaction, entitling it to the judgment rendered by the trial court."

The latest case in Texas is that of *Tarrant Wholesale & Drug Company v. Kendall, et ux., by Texas Court of Civil Appeals, 223 S. W. 2d 964*, decided October 19, 1949, in which the defendant's plea of accord and satisfaction was sustained. The account was in dispute, and the debtor sent the creditor a cashier's check on December 10, 1946, stating in the letter that it was sent in full and final payment

and in settlement of any and all amounts owed by them. On December 13, 1946, the creditor wrote the debtor that it refused the check, except as part payment on the account, but did not return the check. On December 19, 1946, the creditor filed suit for the balance on account. On October 22, 1947, the creditor amended its petition and tendered the check into registry of the court. Held:

> "When the check was tendered upon condition that it be accepted in full payment, it became the duty of appellant to either accept or refuse the tender. It could not retain possession of the check, thus depriving appellees of the use of the funds, and at the same time insist that it was refusing the offer. For, upon a refusal of the offer, the check should have been returned to appellees and a tender of the check into court did not meet this requirement", quoting from the case of *Root & Fehl v. Murray Tool Co., Texas Commission of Appeals, 26 S. W. 2d 189, 75 A. L. R. 902*, cited and quoted supra.

In *Stetson-Preston Co. v. H. S. Dodson & Co., 103 S. W. 685 (Texas Court of Civil Appeals)*, the opinion is short and we quote same, as follows:

> "The judgment of the trial court may be affirmed on that phase of the case which shows that the appellants received, cashed and used the check sent them by Dodson, accompained with the statement that it was in settlement of the indebtedness due them, made with their representative, McClellan & Co. This check was accompanied with a full statement, showing what was embraced in the settlement between Dodson and McClellan. The letter in which the checks was sent to the plaintiffs fully informed them that it was intended for a certain purpose; that is, in payment of an amount determined to be due under a settlement with their agent, McClellan. They accepted this check and appropriated the funds that arose from cashing it. It is true

at the same time they wrote a letter to the appellees, in effect stating that they would not be bound by this settlement, but that they would credit and had credited the sum received on appellee's indebtedness. There was existing prior to that time a controversy between the parties as to what the amount was. If it be conceded that McClellan & Co. were not authorized to make a full settlement with the appellees, and if in making such settlement they allowed the appellees certain credits which they were not entitled to, these facts would not affect the right of the appellees to judgment under the peculiar circumstances of this case. The appellants were only authorized to accept and appropriate the draft in accordance with the terms under which it was sent. They were distinctly informed that it was sent in full payment of a settlement made with McClellan; and, if they did not intend to be bound by such settlement, they should have repudiated the transactions in toto and returned to the appellees the draft received. Knowing that it was sent in pursuance and satisfaction of that settlement, retaining the draft and appropriating it operated in law as a ratification of the act of McClellan, and bound them to the terms of the settlement agreed upon."

In *Buford v. Inge Construction Co., 279 S. W. 513, (Texas Civil Appeals)*, there was a dispute between Buford and the Construction Company as to the amount owing, and Buford wrote the Construction Company that he was enclosing his check for $707.50 "in full payment of work done", on the back of which check was the following: "Indorsement of this check constitutes acceptance in full settlement of all claims". The Construction Company endorsed this check, had it certified and then deposited same and it was paid. At the time of deposit the Construction Company wrote Buford that "the settlement was not satisfactory" and offered to arbitrate the balance, and

subsequently sued for the balance. The appellate court sustained the defense of accord and satisfaction, saying "When appellee (construction company) received this check and explanatory letter, it was given the choice, either to accept the check as full payment of its debt, or to return same, unaccepted, and hold appellant for its full claim. When appellee's manager chose the former course and accepted the money represented by the check, he thereby took said money under the sole condition on which it was tendered, unaffected by any mental attitude of its said manager in reference to whether it was accepted as full and complete payment of the debt. Such mental attitude cannot control the affect of said act. We, therefore, hold that the undisputed evidence in this case shows that there was a valid accord and satisfaction of this debt, and that same is a bar to the claim asserted by appellee in this suit."

In *Hunt v. Ogden, 125 S. W. 386 (Texas Court of Civil Appeals), writ of error denied by Texas Supreme Court,* Ogden sent Hunt his check in settlement of a disputed account, on which was written "in full settlement to date", which check Hunt received and cashed, and sued for the balance. The defense was accord and satisfaction, which the court sustained, saying: "Where a tender or offer is thus made, the party to whom it is made has no alternative but to refuse it or accept it upon such conditions. *If he takes it, his claim is cancelled, and no protest, declaration or denial of such, so long as the condition is insisted upon, can vary the result.*" (Emphasis ours.)

In *Wagner & Sons v. Harris, 207 S. W. 632 (Texas Civ. Appeals),* the debtor sent his creditor two checks, with ac-

companying letters, one of which stated, "We are enclosing statement to cover everything shipped by you * * *"; the other letter said: "This, we believe, settles with you in full, * * *" The creditor cashed the checks and sued for the balance, the defendant plead accord and satisfaction. The creditor recovered in the trial court, but the appellate court reversed and rendered, saying in part: "It is the settled rule that, when a statement is received by one party to a controversy from the other, that statement showing the balance due, and payment of that balance is accepted, it constitutes accord and satisfaction, and is a settlement of the claims between the two parties."

In the case of *Texas & Pacific Railway Co. v. Poe, 115 S. W. 2d 591*, the Supreme Court of Texas holds that the receipt and cashing of a draft is acceptance thereof and of the terms upon which it was tendered. Poe claimed an injury. "The draft given to Poe was for $160.00, and contained this provision: 'In full and complete settlement and payment for personal injuries received at Sweetwater, Texas, November 23, 1931'; and on the back thereof in large type, 'Read before endorsing'.

"Poe took the draft, and after keeping it for three days cashed it; and he still retains the money and makes no unconditional offer to return it to the railway company."

The defense was accord and satisfaction which the Supreme Court sustained, saying:

"Under the state of this record, Poe was concluded from a recovery against the railway company by his acceptance and cashing of the railway company's draft, and the re-

tention of the proceeds. *Missouri, Kansas & Texas Ry. v. Morgan, Texas Commission of App., 210 S. W. 512; 1 Texas Juris. p. 281, Art. 37; 1 C. J. S., Accord and Satisfaction, pp. 528-533, Art. 34.*"

The *Poe case* shows that the Supreme Court of Texas follows the rule as to acceptance stated in *1 C. J. S., Accord and Satisfaction, Art. 34, p. 535*, as follows:

> "A creditor's use of the check or draft, sent him as full satisfaction of a larger claim, as by cashing, depositing or otherwise availing himself of it, constitutes an acceptance of the payment such as to effectuate an accord and satisfaction, although he first strikes out or alters a recital thereon that it is payment in full", citing the Texas case of *Root & Fehl v. Murray Tool Company, 26 S. W. 2d 189, Texas Commission of Appeals, approved by Supreme Court of Texas.*

16 Texas Law Review 101 states:

> "Where a claim is unliquidated or disputed, the cashing of a check marked in full payment is a binding accord and satisfaction, and extinguishes the claim. Root & Fehl v. Murray Tool Co. — *The cashing of the check is held to be an acceptance* even though the words 'in full payment' are erased by the creditor before he cashes the check." (Italics ours.)

1 Texas Juris. p. 277, sec. 34:

> "The general rule may be stated as follows: Where the demand is of a kind that an accord and satisfaction may be consummated by the payment of a less sum than that demanded (as, for instance, where there is a bona fide controversy) the tender by a debtor of a check for an amount less than that claimed by the creditor, upon the condition that it is in full satisfaction of the claim, an acceptance by the creditor *who cashes the check*, even though protesting, constitutes a good accord and satisfaction." (Italics ours.)

1 Texas Juris. p. 281:

> "In the absence of some contrary agreement or understanding between the parties concerning acceptance of checks tendered upon the condition or with memoranda to the effect that they are given in full payment, the acceptance constitutes a binding contract of settlement. The fact that the creditor protests that more is due is of no avail if he accepts the check, for the tender and the condition cannot be severed.
>
> "The one could not be taken and the other rejected. The acceptance of the money involved the acceptance of the condition; and the law will not permit any other inference to be drawn from the transaction. Under such circumstances, the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest can affect the legal quality of the act."

Petitioner respectfully submits that the undisputed facts set out in the opinion of the Honorable United States Court of Appeals, 5th Circuit, conclusively show, when the law of Texas is applied thereto, an acceptance on the part of respondent of the check and the terms upon which it was tendered, hence an accord and satisfaction of the claims sued on by respondent.

The error of the Honorable United States Court of Appeals lies in its failure and refusal to follow the Texas decisions on the question of acceptance in accord and satisfaction cases.

Respondent admitted receiving the letter and the check, the acceptance of the check, deposit and cashing of same, the retention of the proceeds and their application on account. (R. p. 2; R. p. 23; R. p. 44.)

The letter of August 7, 1948, referred to by the Honorable United States Court of Appeals written by respondent by its agent, Mr. Shubert (R. pp. 45-6-7), is under the Texas decisions a mere protest, ineffective to vary the legal result of having received and cashed the check tendered in full settlement of the disputed account. It is a mere protest whether written the day the check was received or subsequently; whether dictated by the respondent's agent or president; it remains a mere protest as long as the check was cashed and the funds retained.

But under the decision of the Honorable United States Court of Appeals, 5th Circuit, such letter is not an ineffective protest at all, but is a potent weapon by which the creditor, having received the debtor's check tendered in full settlement and having accepted same by cashing the check, may destroy the legal result of his act of acceptance at his own pleasure. This is in direct conflict with the rule of the Texas courts.

ARGUMENT AND AUTHORITIES UNDER ASSIGNED ERROR 5

No party to this litigation has claimed that the law of any state controls herein than Texas law. Nevertheless, to remove any inference that such might have been the case, petitioner submits *Rule 184a of the Rules of Civil Procedure of Texas*, which reads as follows:

> "The judge upon the motion of either party shall take judicial notice of the common law, public statutes, and court decisions of every other state, territory, or jurisdiction of the United States. Any party requesting that judicial notice be taken of such matter shall

> furnish the judge sufficient information to enable him properly to comply with the request, and shall give each adverse party such notice, if any, as the judge may deem necessary, to enable the adverse party fairly to prepare to meet the request. The rulings of the judge on such matters shall be subject to review." See *11 Texas Bar Journal, p. 38; Franki's Vernon's Rules of Civil Procedure of Texas.*

In the absence of pleading and invoking the rule as prescribed, Texas law governs the case. See *Milner v. Schaeffer, 211 S. W. 2d 600 (Texas Court of Civil Appeals) writ of error refused Supreme Court of Texas; John Hancock Life Insurance Co. v. Stanley, 215 S. W. 2d 416 (Texas Civil Appeals).*

There are no pleadings in this case as to the law of any state than Texas, nor was there any motion made as prescribed by *Rule 184a.* Hence, Texas law controls the case.

Wherefore, for the reasons set forth herein, petitioner prays that, upon hearing by this Honorable Court, the judgment of the United States Court of Appeals, Fifth Circuit, No. 12,748 on the docket of said court, be reversed in so far as it affirmed the judgment of the trial court, otherwise affirmed, except that all costs in all courts be charged against respondent. And for such other relief as to this Honorable Court may seem proper.

Respectfully submitted,

Jackson N. Townsend, Jr.
Attorney for Petitioner.

Jackson N. Townsend
Of Counsel.

STATE OF TEXAS
COUNTY OF DALLAS

I, Pat Reed, Attorney for Capitol Steel & Iron Company, respondent in the foregoing Petition for Certiorari, hereby acknowledge receipt of copy of said Petition and Brief in Support Thereof, and I hereby waive notice of filing of same, service and proof of service, and returns thereof on me.

Pat Reed

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